82-1115

Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1982
No.

ROBERT J. KONDRAT
Petitioner

vs.

CITY OF WILLOUGHBY HILLS
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF PETITIONER FOR WRIT OF CERTIORARI

ROBERT J. KONDRAT, PRO SE
29121 Chardon Road
Willoughby Hills, OH 44092
Telephone (216) 944-0140

BYRON & CANTOR, Attorney for Respondent
36100 Euclid Avenue
Willoughby, OH 44094
Telephone (216) 951 2303

SUPREME COURT OF THE UNITED STATES

October Term, 1982
No.

ROBERT J. KONDRAT
Petitioner

vs.

CITY OF WILLOUGHBY HILLS
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF PETITIONER FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. An ordinance of the city of Willoughby Hills, Ohio makes it unlawful to permit or maintain premises which reduce property values. Is there a denial of equal protection of the laws when the ordinance is not enforced uniformly?

2. Is there a denial of due process of law when the assignment of a case is made by a prejudiced judicial officer?

3. Is due process of law denied when Petitioner must represent himself because competent legal counsel cannot be obtained?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW..... 1

TABLE OF CONTENTS..... 2

TABLE OF AUTHORITIES..... 2

OPINIONS BELOW..... 3

JURISDICTIONAL STATEMENT..... 4

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED. 4

STATEMENT OF THE CASE..... 4

ARGUMENT..... 6

CONCLUSION..... 9

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION..... 4

U.S. CONSTITUTION, FOURTEENTH AMENDMENT..... 4

U.S. CONSTITUTION, FIRST AMENDMENT..... 5

YICK WO v. HOPKINS, 118 U.S. 356; 6 S.Ct. 1064; 30 L. Ed. 220-..... 6

TUMEY v. OHIO, 273 U.S. 510; 47 S.Ct. 437; 71 L. Ed. 749..... 7

POWELL v. ALABAMA, 287 U.S. 45; 53 S.Ct. 55; L. Ed. 158..... 8

GIDEON v. WAINWRIGHT, 327 U.S. 335; 83 S.Ct. 792; 9 L. Ed. 2d 799..... 8

APPENDIX..... A1

OPINIONS BELOW

The Supreme Court of Ohio in Case No. 82-1415 on November 17, 1982, dismissed Petitioner's appeal on the basis that no constitutional question existed.

On August 30, 1982, the Eleventh District Court of Appeals of Ohio, in Case No. CA 9-069, affirmed the decision of Lake County Common Pleas Court of January 27, 1982 in Case No. 80-CIV-1263, which denied Petitioner's Summary Judgment and granted Respondent's Summary Judgment.

JURISDICTIONAL STATEMENT

A Petition for a Writ of Certiorari is sought of the judgment or decree of the Supreme Court of Ohio entered November 17, 1982. The statutory provision confered on this court to review the judgment or decree in question by Writ of Certiorari, is the supremacy clause of the U.S. Constitution which establishes that federal law shall prevail over state and local laws where state or local laws interfers with federal law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved is the Fourteenth Amendment to the United States Constitution which provides that no person shall be deprived of life, liberty or property without due process of law, nor denied equal protection of the laws.

STATEMENT OF THE CASE

A codified ordinance exists in the city of Willoughby Hills, Ohio governing exterior property nuisances. This ordinance is to protect the residents

against property devaluation. The enforcement of the ordinance by the city is carried out on a discriminatory basis with strict enforcement in some areas and no enforcement in others. The Petitioner had called upon the city numerous times to complain of the lack of enforcement in Petitioner's neighborhood. As a result of the discriminatory enforcement of this ordinance by the city, the Petitioner's property value was decreased over thirty percent by the taxing district. Petitioner sought damages against the city for the loss suffered.

Petitioner filed his complaint in the Lake County, Ohio Common Pleas Court. The court assignment judge that placed the case had once conspired to have Petitioner secretly indicted on fabricated criminal activity resulting from Petitioner's exercise of the First Amendment because of the city's discriminatory practice. Evidence showing the property devaluation was presented the court. The court in the first instance rendered a decision against Petitioner. Appeal was made to the state appellate

court citing a denial of due process and equal protection of the laws because of the prejudiced assignment judge. The appellate court rendered a decision affirming the first court's decision. Petitioner appealed to the Supreme Court of Ohio citing a denial of due process of law, and equal protection of the laws; and pleading that Petitioner was no attorney and asking that the court address itself to the facts. The Ohio Supreme Court ruled that no constitutional question existed.

ARGUMENT

QUESTION NO. 1. A city ordinance when not enforced uniformly does deny equal protection of the laws. In Yick Wo v. Hopkins, 118 U.S. 356; 6 S.Ct. 1064; 30 L. Ed. 220, the court ruled that any ordinance, however fair and impartial it may appear on the surface, if it be administered "with an evil eye and an unequal hand", is a denial of equal protection of the laws, and a violation of the Fourteenth Amendment. The court further ruled that the provisions of the Fourteenth Amendment are not confined to the protection of citizens.

QUESTION NO. 2. The assignment of this case in the court of first instance was made by a judicial officer who had once conspired to have the Petitioner secretly indicted on fabricated criminal activity stemming from Petitioner's exercise of the First Amendment. The conspiracy was subsquently exposed and the judicial officer was sued for his part. The judicial officer was rescued by the immunity doctrine. Petitioner argues that the stigma of Petitioner's litigation against the judicial officer could not be erased, and that in the capacity as assignment judge, the judicial officer could prejudice the case by assigning it to a judge having thoughts and views sympathetic with those of the assignment judge. Under such circumstances impartially is destroyed. Remedies existed whereby the assignment judge could have, and should have removed himself completely from the case. The involvement of the assignment judge, regardless of how small it may have appeared to be, nevertheless cast its shadow. In Tumey v. Ohio, 273 U.S. 510; 47 S.Ct. 437; 71 L.Ed. 749, the court ruled that

due process of law was deprived the defendant by subjecting his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case. When denied the right to an impartial judge it violates the Fourteenth Amendment. In the instant case, Petitioner argues that the assignment judge had a direct, personal interest in seeing that a conclusion against the Petitioner was reached.

QUESTION NO. 3. In our country the right to and aid of counsel is guaranteed. In Powell v. Alabama, 287 U.S. 45; 53 S.Ct. 55; L.Ed. 158, the court ruled that the ordinary layman, even the intelligent and educated layman, is not skilled in the science of law, and needs the advice and direction of competent counsel. A denial of counsel is a denial of due process. In Gideon v. Wainwright, 327 U.S. 335; 83 S.Ct. 792; 9 L.Ed. 2d 799, the court ruled that an indigent must be provided counsel in a noncapital case, and that a provision of the Bill of Rights which is "fundamental and

essential to a fair trial" is made obligatory upon the states by the Fourteenth Amendment. The Petitioner in this case is no indigent, but can afford counsel and tried to obtain counsel. But competent counsel could not be had for fear that any representation in such litigation could imperil counsels' career. As expressed by one attorney, "I would be dead in Lake County". Confronted with this atmosphere, Petitioner had to represent himself. Petitioner tried his best, but could not compete on the same level as those schooled in the law. Petitioner argues that when the events and circumstances are such so as to preclude the right to, and aid of counsel, and the layman must represent himself against those who are skilled in the law, then due process of law is denied.

CONCLUSION

The case is not complex. Petitioner suffered a loss in property value because the city would not enforce its ordinance. The city had been notified repeatedly of the violation. When Petitioner's complaints went unheard, the Petitioner exercised

his right to petition the government for a redress of grievances. As retribution for the petitioning, the city officials conspired to fabricate criminal activity against Petitioner. The conspiracy was exposed and Petitioner sought justice in the courts. Petitioner tried to obtain competent counsel. But because of the sensitivity of the conspiracy issue, and due to the city and county officials involved, counsel either refused or feared the undertaking of such litigation. Consequently, the Petitioner was forced to represent himself. Petitioner is no attorney, is not schooled in the law, nor does he know court procedures, legal terminology or tactics of the profession, or how to properly phrase briefs, pleadings, etc. The courts have known this and have taken advantage of Petitioner's weakness by rendering decisions on all types of technicalities. Instead of looking at the evidence, applying common sense, and rendering a decision based on the facts, and based on Petitioner's level of understanding, the lower courts have discriminated to deny justice to the layman simply for the sake of convenience

to themselves and a profession. Is this the kind of justice that the layman can expect in our judicial system? Is this the kind of justice that the framers of our Constitution intended?

Respectfully Submitted,

Robert J. Kondrat, pro se
29121 Chardon Road
Willoughby Hills, OH 44092
Telephone (216) 944 0140

City of Willoughby Hills, OH
Byron & Cantor
Attorney for Respondent
330 Lake West Medical Bldg.
36100 Euclid Avenue
Willoughby, OH 44094
Telephone (216) 951 2303

SUPREME COURT OF THE UNITED STATES

October Term, 1982
No.

ROBERT J. KONDRAT
Petitioner

vs.

CITY OF WILLOUGHBY HILLS
Respondent

APPENDIX

APPENDIX TABLE OF CONTENTS

COMPLAINT WITH EXHIBIT "A"..... A1

REPLY BRIEF & MOTION FOR SUMMARY JUDGMENT.... A3

DECISION IN THE COURT OF COMMON PLEAS OF LAKE COUNTY, OH..... A5

JUDGMENT ENTRY IN THE COURT OF COMMON PLEAS OF LAKE COUNTY, OH..... A8

JOURNAL ENTRY IN THE COURT OF APPEALS OF OH, OF THE SEVENTH DISTRICT..... A10

OPINION IN THE COURT OF APPEALS OF OH, OF THE ELEVENTH DISTRICT..... A11

MOTION OVERRULED BY THE SUPREME COURT OF OH.. A15

MOTION DISMISSED BY THE SUPREME COURT OF OH.. A16

A1

IN THE COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

DEC

ROBERT J. KONDRAT
29121 Chardon Road
Willoughby Hills, OH 44092
Plaintiff

-VS-

CITY OF WILLOUGHBY HILLS
35405 Chardon Road
Willoughby Hills, OH 44094
Defendant

CASE NO. 80CV01263

Judge

COMPLAINT

JURY TRIAL DEMANDED

Now comes Plaintiff and, for his Complaint, alleges as follows:

1) That the Mayor, Councilmen and Law Director of the City of Willoughby Hills are elected and/or appointed officials responsible for the lawful administration of city government.

2) Plaintiff alleges that City of Willoughby Hills officials have not administered government in a lawful manner. Plaintiff alleges that the City of Willoughby Hills officials have repeatedly refused to enforce Chapter 1337.02 (see Exhibit "A") of the Willoughby Hills Codified Ordinance, although the officials have been called upon time and time again to enforce its codes and ordinances.

3) As a result of the City of Willoughby Hills officials not administering government in a lawful manner, the Plaintiff was damaged and is continuing to be damaged. In 1977 the valuation of Plaintiff's property, and other properties in the neighborhood, was devalued by the Lake County Treasurer's office. This devaluation resulted from the creation of a junk yard on residentially zoned property in violation of the codified ordinance and the officials refusal to act.

4) Plaintiff demands damages in the sum of Thirty Thousand ($30,000) Dollars, reasonable attorney's fees in connection with this lawsuit and all costs together with interest thereon from the date of judgment at maximum amount allowable by law.

Robert J. Kondrat

SERVICE

A copy of the foregoing COMPLAINT was mailed by Certified U.S. mail, postage prepaid, to Mayor Melvin Schaefer, 35405 Chardon Road, Willoughby Hills, OH 44094, on this 24th day of November, 1980.

Robert J. Kondrat

Exhibit

CHAPTER 1337
Unsafe Structures

1337.01 Unsafe structures defined; declared a nuisance; abatement.
1337.02 Exterior property nuisances defined; abatement.
1337.03 Inspection; notice of defects to owner.
1337.04 Service of notice; posting.
1337.05 Failure to comply.
1337.06 Emergency action.
1337.07 Costs incurred; recovery.

CROSS REFERENCE
Abatement and cost recovery - see Ohio R. C. 715.26(B), 715.261

1337.01 UNSAFE STRUCTURES DEFINED; DECLARED A NUISANCE; ABATEMENT.
All buildings or structures, including one family and two family dwellings, which are structurally unsafe, unsanitary, or not provided with adequate safe egress, or which constitute a fire hazard, or are otherwise dangerous to human life or which in relation to existing use constitute a hazard to safety or health by reason of inadequate maintenance, dilapidation, obsolescence or abandonment are, for the purpose of this chapter, declared to be unsafe structures. All such unsafe structures are hereby declared to be public nuisances and shall be abated by repair, rehabilitation, demolition or removal in accordance with the procedures specified in this chapter.
(Ord. 1967-30. Passed 7-13-67.)

1337.02 EXTERIOR PROPERTY NUISANCES DEFINED; ABATEMENT.
No owner of any premises shall maintain or permit to be maintained at or on the exterior property areas of such premises any condition which deteriorates or debases the appearance of the neighborhood; or reduces property values in the neighborhood; or adversely alters the appearance and general character of the neighborhood; or creates a fire, safety or health hazard; or which is a public nuisance; including but not limited to the following:

(a) Broken or dilapidated fences, walls or other structures.
(b) Out of use or nonusable appliances, dilapidated automobiles or automobile parts.
(c) Rugs, rags or other materials hung on lines or in other places on such premises, which materials are not being used for general household or housekeeping purposes; broken, dilapidated or unusable furniture, mattresses or other household furnishings; plastic materials, paints, miscellaneous coverings and/or any other materials including those described in this section, placed at or on the premises in such a manner as to be patently unsightly, grotesque or offensive to the senses.

All such conditions are hereby declared to be public nuisances and shall be abated by repair, rehabilitation, demolition or removal in accordance with the procedures specified in this chapter. (Ord. 1967-30. Passed 7-13-67.)

IN THE COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

13 Cm

ROBERT J. KONDRAT Plaintiff -vs- CITY OF WILLOUGHBY HILLS Defendant	CASE NO. 80 CIV 1263 JUDGE RICHARD B. McQUADE, JR. REPLY BRIEF AND EVIDENCE - MOTION FOR SUMMARY JUDGMENT

JAN

In accordance with the court's letter of December 24, 1981, this reply is submitted for the court's consideration.

Attached hereto as EXHIBIT "A" is property tax billing invoiced for first half tax year of 1976, submitted by Mable P. Johnson, Treasurer of Lake County, on Plaintiff's property. The top bill shows a valuation of $13860.00 The bottom bill, the one that was paid, shows a valuation of $9810.00. This shows a total devaluation of $4050.00 as a result of the alleged judgment.

The court's letter of December 24, 1981 states that the motions appear to raise questions of law only. There is no law involved here. Only common sense is involved. Figures don't lie.

The court is asked to grant Plaintiff immediate Summary Judgment for the relief as stated in the Complaint.

Respectfully Submitted,

Robert J. Kondrat

SERVICE

A copy of the foregoing was mailed this 4th day of January, 1982, to the United States Attorney General, The Department of Justice, Washington, D.C. 20530; and to Barry M. Byron, Byron & Cantor, Suite 330, 36100 Euclid Avenue, Willoughby, OH 44094, by certified and regular U.S. mail respectively, postage prepaid.

Robert J. Kondrat

cc: News Media
Bar Associations

KONDRAT ROBERT J
4 TRACT
1 LOT
EUCLID-CHARDON RD ALOT
FT 0.00AC 2.38

COLLECTION CLOSES FEB 15, 1977 KONDRAT ROBERT J
PARCEL NO 31A-008E-00-019 29121 CHARDON RD
MAP SYMBOL WICKLIFFE OH 44092

30138 27124 28904
39986 1780
9848 3014 28904

MABLE P. JOHNSON
KONDRAT ROBERT J
4 TRAC
1 LO
EUCLID-CHARDON RD ALO
FT 0.00AC 2.38

DETACH TREASURER'S RECEIPT
31A-008E-00-019
4,260
9,600
13,860
WILLOUGHBY HILLS CTY
27124 28904
1780
28904

EXHIBIT "A"

A5

IN THE COURT OF COMMON PLEAS OF LAKE COUNTY, OHIO

Robert J. Kondrat Plaintiff, vs. City of Willoughby Hills, Defendant.	)	Case No. 80-CIV-1263 DECISION JAN 21 1982

This case is before the Court upon the motions for summary judgment of both parties.

Addressing first the defendant's motion, it is contended that the complaint fails to state facts upon which relief can be granted. The plaintiff alleges that the City of Willoughby Hills officials have unlawfully refused to enforce Chapter 1337.02 of the Willoughby Hills Codified Ordinance by permitting the operation of a junk yard on residentially zoned property, and that as a result, plaintiff's property has been devalued.

The enforcement of the ordinance is a governmental, as opposed to a proprietary function. Wooster v. Arbenz, 116 Ohio St. 281, 284-5 (1927); Cutnau v. Columbus, 77 O.L.A. 596, 598 (1958). Except as otherwise provided by statute, municipal corporations are immune from liability in the performance of their governmental functions. Brought v. Cleveland, 167 Ohio St. 29 (1957); Haas v. Hayslip, 51 Ohio St. 2d 135, 136 (1977). See City of Mansfield v. Bristor, 76 Ohio St. 270, syllabus 3 (1907) wherein it is held:

> The power given to a municipality to prevent injury or annoyance from anything offensive or unwholesome, and to cause any nuisance to be abated, is governmental, and the municipality is not liable for damages from a private nuisance resulting from its ommission to exercise the power by the adoption of resolutions or ordinances, or for damages from such nuisance occasioned by a failure of its officers to enforce resolutions or ordinances adopted in the exercise of that power.

Also see Western College v. Cleveland, 12 Ohio St. 375 (1861).

In Oregon v. Ferguson, 57 Ohio App. 2d 95, (1978) the Franklin County Court of Appeals dealt with an action for the failure of state examiners to detect unlawful shortages in the accounting of a city clerk-auditor. In holding that the complaint stated no claim for relief the court reasoned that:

> Statutes requiring state agencies to inspect and enforce safety standards were enacted to protect the public generally against unsafe conditions. They were not intended . . . to create a duty toward any particular person. Likewise their performance or nonperformance cannot be the basis of a tort action by an injured person.

Id. at 101. The court also stated that if the legislature intended to abolish governmental immunity in this respect, they could have clearly and unequivocally indicated this intent in the actual language used. Id. at 102. In interpreting a statute or ordinance it is to be presumed that the legislature used the language advisedly, intelligently, and expressed its intent by use of the words contained in the ordinance. Cleveland Trust Co. v. Eaton, 21 Ohio St. 2d 129 (1970); Financial Indemnity Co. v. Cargile, 32 Ohio Misc. 103 (1972); 50 O. Jur. §173 at 147 (1961).

In further support of their motion for summary judgment, the defendant contends that there have been no damages suffered by the plaintiff. Defendants have attached the affidavit of Melvin G. Schaefer Mayor of Willoughby Hills and defendant in this matter stating that he is personally familiar with the premises owned and occupied by the plaintiff, and that there is no actionable violation of Section 1337.02 of the Willoughby Hills Code existing near or in the neighborhood of the plaintiff's property. Furthermore, he has attached the Lake County Real Estate Tax records for plaintiff's property which indicate that the plaintiff's property has increased in the period from 1976 to the date of filing this action.

By way of reply brief and motion for summary judgment, plaintiff has attached tax billing invoices for the year 1976. Plaintiff did not attach tax bills for the years 1977, 1978, and 1979. Beyond this the plaintiff has made no legal arguments. When a motion for summary judgment is made, an adverse party may not rest upon the mere allegations of his pleadings, but his response, by affidavit or otherwise, mus

set forth that there is a genuine issue for trial. 56(E) Ohio R. Civ. P.

It appears from the evidence that reasonable minds can come to but one conclusion and that conclusion is adverse to the plaintiffs. Accordingly, the defendants' Motion for Summary Judgment is found well taken and is hereby granted, plaintiff's motion is hereby denied. Defendant to journalize.

Richard B. McQuade, Jr.
Judge by Assignment

cc: Mr. Robert J. Kondrat
Mr. Barry M. Byron, Esquire

A8 FILED

1/22/82jj

JAN 27 1 54 PM '82

ANDY J. TUSH
LAKE CO. CLERK OF COURT

V.S. 1-31-82

JAN 28

IN THE COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

ROBERT J. KONDRAT Plaintiff -vs- CITY OF WILLOUGHBY HILLS Defendant	CASE NO. 80-CIV-1263 JUDGE RICHARD B. McQUADE, JR. JUDGMENT ENTRY

This cause came on to be heard on the Motions for Summary Judgment of both Plaintiff and Defendant.

Upon consideration, the Court finds that the Motion of the Plaintiff for Summary Judgment is not supported by law or evidence, and therefore, said Motion is not well taken.

Upon consideration of the Defendant's Motion for Summary Judgment, the pleadings, the Affidavit and Brief in Support of said Motion and Plaintiff's arguments opposing said Motion, the Court finds that reasonable minds can come to but one conclusion and that conclusion is adverse to the Plaintiff.

The Court further finds that the Defendant City of Willoughby Hills is entitled to judgment as a matter of law. All findings contained herein are based upon the Decision previously announced in this matter which Decision is hereby incorporated by reference into this Judgment Entry as if fully rewritten herein.

The Court further finds, therefore, that the Defendant is entitled to summary judgment dismissing the Complaint of Plaintiff with prejudice.

LAW OFFICES OF
VRON AND CANTOR
SUITE 200
0100 EUCLID AVENUE

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Complaint in this matter be and the same hereby is ordered dismissed with prejudice at Plaintiff's cost.

IT IS SO ORDERED.

Exceptions are noted for Plaintiff.

JUDGE RICHARD B. McQUADE, SR.

APPROVED:

Barry M. Byron
Attorney for Defendant

LAW OFFICES OF
BYRON AND CANTOR
SUITE 500
6500 OUELIO AVENUE
WILLOUGHBY, OHIO 44094

FILED
COURT OF APPEALS
AUG 30 1982
ANDY J. TOTIN
CLERK OF COURT
LAKE COUNTY, OHIO

STATE OF OHIO)
)
LAKE COUNTY) SS:

IN THE COURT OF APPEALS OF OHIO

SEVENTH DISTRICT

ROBERT J. KONDRAT,)
PLAINTIFF-APPELLANT,) JOURNAL ENTRY
- VS -) CASE NO. CA 9-069
CITY OF WILLOUGHBY HILLS,)
DEFENDANT-APPELLEE.)

AUG 1982

For the reasons stated in the opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this court that the judgment of the Common Pleas Court of Lake County, Ohio, is affirmed. Costs to be taxed against plaintiff-appellant.

Joseph E. Ford, P.J.
JUDGE.

FILED
COURT OF APPEALS
AUG 30 1982
ANDY J. TOTIN
CLERK OF COURT
LAKE COUNTY, OHIO

STATE OF OHIO, LAKE COUNTY

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

ROBERT J. KONDRAT,	)	
PLAINTIFF-APPELLANT,	)	OPINION
- VS -	)	CASE NO. CA 9-069
CITY OF WILLOUGHBY HILLS,	)	
DEFENDANT-APPELLEE.	)	

APPEARANCES.

Robert J. Kondrat, 29121 Chardon Road, Willoughby Hills, Ohio 44092

Barry M. Byron, Willoughby, Ohio, for Defendant-Appellee.

Hon. Joseph E. O'Neill,
Hon. Joseph Donofrio, JJ.,
of the 7th Appellate District, and
Hon. William H. Victor, J.,
of the 9th Appellate District,
sitting by assignment in the
11th Appellate District.

Dated:

O'NEILL, J.

On December 1, 1980, the appellant filed a complaint in the trial court naming the City of Willoughby Hills as the defendant. The complaint alleged that officials of the City had refused to enforce a chapter of the City ordinances resulting in damage to the plaintiff. The complaint prayed for damages in the sum of $30,000.00.

The City answered by way of denial of wrongdoing; failure to state a claim and failure to commence the action within the time provided by law.

Apparently in the process of assignment, this case was assigned to Judge John Parks. On August 7, 1981, Judge Parks referred the file to the Administrative Judge for reassignment, who assigned it to Judge Jackson. On August 14, 1981, Judge Jackson referred the case for assignment to a visiting judge. On September 3, 1981, Judge Mitrovich, the Administrative Judge, assigned the case to visiting Judge Richard McQuade of Fulton County.

On December 22, 1981, the defendant filed a motion for summary judgment with an affidavit attached. The motion argued that municipalities are immune from liability in the performance of governmental functions. The motion also argued that plaintiff had suffered no damages.

On January 5, 1982, the plaintiff moved for summary judgment.

The court dismissed the complaint. In support of dismissal, the court relied upon the case of The City of

Mansfield v. Bristor (1907), 76 Ohio St. 270, the third syllabus of which reads as follows:

> "3. The power given to a municipality to prevent injury or annoyance from anything offensive or unwholesome, and to cause any nuisance to be abated, is governmental, and the municipality is not liable for damages from a private nuisance resulting from its omission to exercise the power by the adoption of resolutions or ordinances, or for damages from such nuisance occasioned by a failure of its officers to enforce resolutions or ordinances adopted in the exercise of that power."

Our research has led us to the conclusion that this is the abiding law and was legal authority for dismissal.

The plaintiff timely filed a notice of appeal and assignments of error and brief. In his brief, he does not argue the legal authority for dismissal as set forth in Mansfield v. Bristor. Instead, he argues that Judge Mitrovich, the Administrative Judge, was biased and should have had no involvement in the case. Upon the record, the only involvement of Judge Mitrovich was the assignment of Judge McQuade, the trial judge. We do not find that such activity, in any way, had anything of a prejudicial effect on the outcome of the case. The appearance of justice was not factually besmirched by Judge Mitrovich nor Judge McQuade. We can only conclude, from the record, that this argument is unsupported and borders upon the frivolous.

Judgment affirmed.

Donofrio, J., concurs,
of the 7th Appellate District,

Victor, J., concurs,
of the 9th Appellate District,

sitting by assignment in the
11th Appellate District.

APPROVED:

PRESIDING JUDGE, of the 7th Appellate District, sitting by assignment in the 11th Appellate District.

80-121 Baggett Brothers, Publishers, Springfield, Ohio

THE SUPREME COURT OF OHIO

NOV

THE STATE OF OHIO,
City of Columbus.

*19*82 *TERM*

To wit: November 17, 1982

Robert J. Kondrat,
Appellant,

vs.

City of Willoughby Hills,
Appellee.

No. 82-1415

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS

for SUMMIT *County*

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

FOR YOUR
INFORMATION
ONLY
NOT FOR FILING

W. Brown, J., not participating

COSTS:

Motion Fee, $20.00, paid by Robert J. Kondrat

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this .....*day of* ..... *19*.....

.....*Clerk*

.....*Deputy*

THE SUPREME COURT OF OHIO

NOV 15

THE STATE OF OHIO, City of Columbus. } 19 82 TERM

To wit: November 17, 1982

Robert J. Kondrat,

Appellant,

vs.

City of Willoughby Hills,

Appellee.

No. 82-1415

APPEAL FROM THE COURT OF APPEALS

for SUMMIT County

This cause, here on appeal as of right from the Court of Appeals for SUMMIT County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

W. Brown, J., not participating

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for SUMMIT County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this ..... day of ..... 19 .....

..... Clerk

..... Deputy

Office-Supreme Court, U.S.
FILED
FEB 2 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1115

Supreme Court of the United States

October Term, 1982

ROBERT J. KONDRAT,
Petitioner,

vs.

CITY OF WILLOUGHBY HILLS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ABRAHAM CANTOR, *Counsel of Record*
BYRON AND CANTOR
Suite 330
36100 Euclid Avenue
Willoughby, Ohio 44094
Telephone: (216) 951-2303
Attorney for Respondent

ROBERT J. KONDRAT, *pro se*
29121 Chardon Road
Willoughby Hills, Ohio 44092
Telephone: (216) 944-0140
Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED

(1) Whether the claimed discriminatory enforcement of a municipal ordinance prohibiting the establishment of a nuisance constitutes a denial of the equal protection clause to a property owner who claims his property values have been lowered.

(2) Whether an administrative judge who in his former elected position as a county prosecutor was involved in Petitioner's indictment causes the assignment of a case for trial to an out-of-county judge constitutes a denial of due process of law.

(3) When a non-indigent Plaintiff in a civil case claims he cannot obtain "competent" legal counsel to represent his interests, is he denied due process of law?

TABLE OF CONTENTS

Questions Presented 1
Opinions Below 1
Jurisdictional Statement 2
Constitutional Provisions and Statutes Involved 2
Statement of the Case 2
Argument 5

1. A municipal corporation is immune from tort liability in the performance of a governmental function 5
2. The conduct of an Administrative Judge who causes the assignment of a case to a visiting judge does not prejudice the rights of a party 7
3. An issue may not be raised for the first time in the Supreme Court of the United States 8

Conclusion 10

Appendix:

Ohio Rules of Superintendence:

Rule 3(B) A1
Rule 4 ..... A1

Ohio Rules of Civil Procedure, Rule 56 ..... A2
Codified Ordinances of Willoughby Hills, Section 1337.02 ..... A5
U. S. Constitution, Amend. VI A6
U. S. Constitution, Amend. XIV A6

TABLE OF AUTHORITIES

Cases

Argersinger v. Hamlin, 407 U.S. 25 (1972) 9
Broughton v. Cleveland, 167 Ohio St. 29 (1957) 5
Escobedo v. Illinois, 378 U.S. 478 (1964) 9
Gideon v. Wainwright, 327 U.S. 335 (1963) 9
Haas v. Hayslip, 51 Ohio St. 2d 135 (1977) 5
Hoffert v. Owatonna Inn Towne Motel, Inc., 199 N.W.2d 158 (Minn. 1972) 6
Kalish v. Trans World Airlines, 59 Ohio St. 2d 73 (1977) 9
Mansfield v. Bristor, 76 Ohio St. 270 (1907) 5
Oregon v. Ferguson, 57 Ohio App. 2d 95 (Franklin Co. 1975) 6
Reckman v. Kerter, 109 Ohio App. 81 (Montgomery Co. 1959) 6
Wooster v. Arbenz, 116 Ohio St. 281 (1927) 5

Constitutional Provisions, Statutes and Rules

U.S. Const., Amend. VI 2, 9
U.S. Const., Amend. XIV 2, 9
C.P. Sup. R.3(B) 7
C.P. Sup. R.4 7
Ohio R. Civ. P., Rule 56 ..... 3, 6
Willoughby Hills Codified Ordinance 1337.02 ..... 2, 5

No. 82-1115

Supreme Court of the United States

October Term, 1982

ROBERT J. KONDRAT,
Petitioner,

vs.

CITY OF WILLOUGHBY HILLS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Ohio Supreme Court in Case No. 82-1415 on November 17, 1982, *sua sponte,* dismissed Petitioner's appeal for the reason that no substantial constitutional question existed.

On August 30, 1982, the Eleventh District Court of Appeals of Ohio in Case No. 9-069 affirmed the summary judgment granted by the Lake County Common Pleas Court on January 27, 1982 in Case No. 80-CIV-1263.

JURISDICTIONAL STATEMENT

Petitioner filed a Petition for Writ of Certiorari on January 3, 1983, pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

No constitutional issue was presented to the trial court. In the State Court of Appeals, Petitioner argued that the Fourteenth Amendment was impinged upon. Petitioner now for the first time argues a Sixth Amendment claim.

STATEMENT OF THE CASE

Petitioner Robert J. Kondrat filed a *pro se* Complaint against the City of Willoughby Hills, Ohio alleging that the City had failed to enforce Willoughby Hills Codified Ordinance 1337.02 which prohibits public nuisances. Mr. Kondrat claimed that the City had unlawfully refused to enforce the Ordinance by allowing the operation of a junk yard on residentially zoned property and as a result of the City's failure to enforce the Ordinance, the value of his real estate had been lowered. The case was assigned to the Honorable John M. Parks for trial. An Answer was filed on behalf of the City.

The case at bar was transferred by the Trial Judge, to the Administrative Judge, Judge Paul H. Mitrovich, for reassignment. The Administrative Judge assigned the case to the Honorable James W. Jackson on August 13, 1981. The next day, August 14, 1981, Judge Jackson transferred the case back to the Administrative Judge for reassignment to a visiting judge.

On September 3, 1981, the Administrative Judge assigned the case to the Honorable Richard B. McQuade of the Fulton County Court of Common Pleas.

The City of Willoughby Hills filed a Motion for Summary Judgment based upon two grounds: first, no justiciable claim for relief had been stated in the Complaint, and secondly, that no damages had been sustained by Petitioner.

The Petitioner filed a document styled "Notice to the Court" stating his objections to the City's Motion for Summary Judgment. No documentation within the ambit of Ohio Civil Rule 56, *Summary Judgment,* was presented.

The trial court rendered judgment on behalf of the City of Willoughby Hills on January 27, 1982. A Notice of Appeal to the Court of Appeals was filed thereafter.

Petitioner raised only one issue in the Court of Appeals, whether the assignment by the administrative judge of the trial court to a visiting judge from another county in Ohio was in error. Petitioner claimed that as a result of a criminal indictment rendered by the Lake County Grand Jury against him while the administrative judge was the county prosecutor, the proceedings were tainted.

On August 30, 1982, the Ohio Court of Appeals wrote *inter alia* in affirming the trial court decision:

> "In his brief (Appellant Kondrat), he does not argue the legal authority for dismissal as set forth in *Mansfield v. Bristor.* Instead he argues that Judge Mitrovich, the Administrative Judge, was biased and should have had no involvement in the case. Upon the record, the only involvement of Judge Mitrovich was the assignment of Judge McQuade, the trial judge. We do not find that such activity in any way had anything

> of a prejudicial effect on the outcome of the case. The appearance of justice was not factually besmirched by Judge Mitrovich nor Judge McQuade. We can only conclude, from the record, that this argument is unsupported and borders upon the frivolous." (Opinion, p. 2)

Petitioner filed a Memorandum in Support of Jurisdiction to the Ohio Supreme Court which was opposed by Appellee. On November 17, 1982, the Ohio Supreme Court *sua sponte* dismissed the appeal because no substantial constitutional question existed within the case.

On January 3, 1983, Petitioner filed his Petition for Writ of Certiorari.

ARGUMENT

1. A MUNICIPAL CORPORATION IS IMMUNE FROM TORT LIABILITY IN THE PERFORMANCE OF A GOVERNMENTAL FUNCTION.

The trial court granted summary judgment in favor of the City of Willoughby Hills on three separate grounds: (1) the city was immune from suit, (2) no duty inured to the benefit of Petitioner, and (3) the Petitioner did not sustain damage.

The enforcement of an ordinance which establishes building conditions constitutes a governmental function. *Wooster v. Arbenz*, 116 Ohio St. 281, 284-5 (1927). Except as provided by statute, a city is immune from liability in the performance of a governmental function. *Broughton v. Cleveland*, 167 Ohio St. 29 (1957); *Haas v. Hayslip*, 51 Ohio St. 2d 135, 136 (1977). Petitioner complained that the city failed to enforce Willoughby Hills Codified Ordinance 1337.02 which prohibits the creation of a public nuisance. Petitioner further claimed that a junk yard was created on an adjoining property lessening Petitioner's property value.

The trial court and the Court of Appeals agreed that governmental immunity applied and that an Ohio Supreme Court case was dispositive of the issue. In Syllabus 3 of *Mansfield v. Bristor*, 76 Ohio St. 270 (1907), the court stated:

> 3. The power given to a municipality to prevent injury or annoyance from anything offensive or unwholesome, and to cause any nuisance to be abated, is governmental, and the municipality is not liable for damages from a private nuisance resulting from

its omission to exercise the power by the adoption of resolutions or ordinances, or for damages from such nuisance occasioned by a failure of its officers to enforce resolutions or ordinances adopted in the exercise of that power.

The enforcement or failure to enforce a municipal ordinance does not create a duty from a city to an individual citizen upon which a tort claim may be premised. Instead, the legislation is intended to benefit the public generally. *Oregon v. Ferguson*, 57 Ohio App. 2d 95 (Franklin Co. 1975); *Reckman v. Kerter*, 109 Ohio App. 81, 90 (Montgomery Co. 1959); *Hoffert v. Owatonna Inn Towne Motel, Inc.*, 199 N.W.2d 158, 160 (Minn. 1972).

Therefore, Petitioner's Complaint failed to state a claim upon which relief could be granted because the city did not have a duty to Petitioner.

Finally, the city showed, through an affidavit, pursuant to the evidentiary requirements of Ohio Civil Rule 56, that Petitioner's property had not decreased in value as had been alleged within the Complaint. Petitioner failed to create a question of fact by contradicting the evidence presented.

Therefore the lower courts were correct in determining that the City of Willoughby Hills was without obligation to Petitioner based on the city's Motion for Summary Judgment because the city was immune from suit, it was without obligation to Petitioner and that Petitioner did not sustain damages.

2. THE CONDUCT OF AN ADMINISTRATIVE JUDGE WHO CAUSES THE ASSIGNMENT OF A CASE TO A VISITING JUDGE DOES NOT PREJUDICE THE RIGHTS OF A PARTY.

Petitioner claims that the conduct of the Administrative Judge of the Lake County Common Pleas Court, the Honorable Paul H. Mitrovich, somehow deprived him of a constitutional right. The issue of prejudice was not presented to the trial court but rather it was claimed in the Court of Appeals as the only assignment of error.

A review of the record reflects that the conduct of the Administrative Judge was in conformity with the Ohio Rules of Superintendence for Courts of Common Pleas.

Upon filing, the case was assigned for trial to the Honorable John M. Parks. C.P. Sup. R.4.

Judge Parks, by Journal Entry, transferred the case to the Administrative Judge, the Honorable Paul H. Mitrovich, for reassignment.

C.P. Sup. R.3(B) provides:

> "The Administrative Judge shall be the presiding officer of his division and shall have full responsibility for and control over the administration, docket and calendar of the division which he serves."

The only issue presented by Petitioner refers to the Administrative Judge's transfer of the case to a visiting judge. There is no claim that Judge Mitrovich ruled on any substantive matter in the case at bar. It must also be noted that no objection to the visiting judge sitting as the trial judge occurred in this case.

Although the Ohio Rules of Superintendence of the Court of Common Pleas are silent as to the procedure

in the transfer of cases, the Ohio Judicial Conference comments to the Rules of Superintendence are instructive:

> The transfer of cases from one judge to another is not specifically addressed in the rules. Transfer is to be contrasted with a judge handling some aspect of the case for another judge. Transfer means the reassignment of a case from one judge to another judge. Transfer is the *obligation* of the administrative judge as a part of his full responsibility for the control of the docket. It is a necessary implication. Transfer should be accomplished with a journal entry. pp. 6-7. (Emphasis supplied).

The Administrative Judge merely fulfilled his obligation as an administrative judge to cause the case to be heard by a neutral judge. The claimed defect now raised in this court for the first time appeared as the *only* issue presented in the Court of Appeals. Therefore, the issue now presented was waived by Petitioner's failure to consider the issue in the trial court.

For the foregoing reasons the conduct of the Administrative Judge of the Lake County Court of Common Pleas was pursuant to the Ohio Rules of Superintendence of the Court of Common Pleas. No error occurred to the detriment of the Petitioner when the case was transferred to a visiting judge who considered the merits of the case at bar.

3. AN ISSUE MAY NOT BE RAISED FOR THE FIRST TIME IN THE SUPREME COURT OF THE UNITED STATES.

Petitioner who has appeared before this court on at least two prior occasions as a *pro se* litigant in Case No. 79-83 and Case No. 79-1710, raises for the first time in this proceeding, that he could not obtain counsel to repre-

sent his interests. The absence of raising the issue in the lower courts now denies review of the issue. *Kalish v. Trans World Airlines,* 59 Ohio St. 2d 73 (1977).

However, Petitioner's Brief supplies sufficient basis for denial of his claimed deprivations. Petitioner is not indigent (p. 9, Brief of Petitioner for Writ of Certiorari).

Petitioner cites *Gideon v. Wainwright,* 327 U.S. 335 (1963) in an attempt to involve Sixth and Fourteenth Amendment considerations. A reading of the Sixth Amendment reflects that it specifically refers only to criminal cases. Justice Goldberg, when commenting upon *Gideon* in *Escobedo v. Illinois,* 378 U.S. 478 (1964) noted that the Sixth Amendment was applicable in both state and federal courts to *criminal* proceedings at trial.

In a criminal proceeding, the state is the initiating party and loss of liberty may be the outcome to the convicted criminal defendant. Only when loss of liberty is at issue must counsel be appointed. *Argersinger v. Hamlin,* 407 U.S. 25 (1972). In the case at bar, it is Plaintiff who has initiated this civil action and who has requested monetary relief. The Sixth Amendment does not apply to civil litigation where the non-indigent Plaintiff requesting counsel seeks damages.

The failure to present the issue presented to the court below, the distinguishing features of the case at bar to a criminal proceeding deny Petitioner a claim for relief.

CONCLUSION

The record does not reflect a constitutional issue which is appropriate for consideration by this court or a conflict among the federal jurisdiction as to any issue of law. The record amply reflects that Respondent was entitled to judgment. Under settled principles of appellate review, a Petitioner may not present new and different issues at each stage in the appellate process. The failure to present constitutional issues with a record to justify such consideration requires that this Writ of Certiorari be denied.

Respectfully submitted,

ABRAHAM CANTOR
BYRON AND CANTOR
36100 Euclid Avenue/Suite 330
Willoughby, Ohio 44094-4492
Telephone: (216) 951-2303
Attorney for Respondent

APPENDIX

OHIO RULES OF SUPERINTENDENCE

Rule 3

ADMINISTRATIVE JUDGE

* * * * *

(B) Powers. The administrative judge shall be the presiding officer of his division and shall have full responsibility for and control over the administration, docket and calendar of the division which he serves. He shall cause cases to be assigned to the judges within the division and shall require such reports from each judge concerning the status of assigned cases as he may require to assist him in discharging his overall responsibility for the observance of these superintendence rules and for the termination of cases in his division without undue delay.

The administrative judge shall maintain records indicating the number of pending cases which each attorney is to try. In civil cases the attorney who is to try the case shall be designated as trial attorney on all pleadings filed therein. At the time of arraignment in criminal cases, the attorney who is to try the case shall be stated in writing by such attorney.

The administrative judge shall formulate such accounting and audit procedures within his division and the office of the clerk of courts as will insure the accuracy of all reports required by these rules.

Rule 4

ASSIGNMENT SYSTEM

For the purpose of these rules, the individual assignment system is that system whereby, upon the filing in,

or transfer to, a division of the court of a civil case, or upon arraignment in a criminal case, a case is immediately assigned by lot to a judge thereof, who thus becomes primarily responsible for the determination of every issue and proceeding in the case until its termination. Under such system, all preliminary matters, including requests for continuances, must be submitted for disposition to the judge to whom the case has been assigned, or if he is unavailable to the administrative judge.

Each multi-judge general division of each court of common pleas shall adopt the individual assignment system as defined herein for the assignment of all cases to judges of the division for disposition.

OHIO RULES OF CIVIL PROCEDURE

Rule 56

SUMMARY JUDGMENT

(A) For party seeking affirmative relief. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) For defending party. A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits for a summary judgment

in his favor as to all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) Motion and proceedings thereon. The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion. If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are

without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(E) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(F) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion for summary judgment that he cannot for sufficient reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented

in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Amended July 1, 1976.

CODIFIED ORDINANCES OF WILLOUGHBY HILLS

1337.02 EXTERIOR PROPERTY NUISANCES DEFINED; ABATEMENT.

No owner of any premises shall maintain or permit to be maintained at or on the exterior property areas of such premises any condition which deteriorates or debases the appearance of the neighborhood; or reduces property values in the neighborhood; or adversely alters the appearance and general character of the neighborhood; or creates a fire, safety or health hazard; or which is a public nuisance; including but not limited to the following:

(a) Broken or dilapidated fences, walls or other structures.

(b) Out of use or nonusable appliances, dilapidated automobiles or automobile parts.

(c) Rugs, rags or other materials hung on lines or in other places on such premises, which materials are not being used for general household or housekeeping purposes; broken, dilapidated or unusable furniture, mattresses or other household furnishings; plastic materials, paints, miscellaneous coverings and/or any other materials including those

described in this section, placed at or on the premises in such a manner as to be patently unsightly, grotesque or offensive to the senses.

All such conditions are hereby declared to be public nuisances and shall be abated by repair, rehabilitation, demolition or removal in accordance with the procedures specified in this chapter. (Ord. 1967-30. Passed 7-13-67.)

AMENDMENTS TO THE U.S. CONSTITUTION

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(Effective 1791)

Ohio Constitution Comparison

Compulsory process, Ohio Const. art. I, § 10.
Confronting witnesses, Ohio Const. art. I, § 10.
Nature of charge, Ohio Const. art. I, § 10.
Right to counsel, Ohio Const. art. I, § 10.
Right to trial by jury, Ohio Const. art. I, § 5.
Speedy and public trial by jury, Ohio Const. art. I, § 10.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(Effective 1868)

Ohio Constitution Comparison

Due process, Ohio Const. art. I, § 16.
Equal protection, Ohio Const. art. I, § 2.

Office-Supreme Court, U.S.
FILED
FEB 18 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1115

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT J. KONDRAT,
Petitioner,

vs.

CITY OF WILLOUGHBY HILLS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

REPLY BRIEF OF PETITIONER

ROBERT J. KONDRAT, pro se
29121 Chardon Road
Willoughby Hills, OH 44092
Telephone: (216) 944 0140
Petitioner

ABRAHAM CANTOR, Counsel of Record
BYRON & CANTOR
Suite 330
36100 Euclid Avenue
Willoughby, OH 44094
Telephone: (216) 951 2303
Attorney for Respondent

TABLE OF CONTENTS

Page

TABLE OF CONTENTS..... 1

REPLY ARGUMENT..... 1

CONCLUSION..... 4

APPENDIX

Opinion of the Ohio Supreme Court in the case of Haverlack v. Portage Homes, Inc. (1982) 2 Ohio St. 3d 26..... 5

Petitioner's Property Tax Devaluation Records. 10

AUTHORITIES CITED

HAVERLACK v. PORTAGE HOMES, INC. (1982) 2 Ohio St. 3d 26..... 1

MONEL v. NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, U.S. Sup. Crt., 75-1914, 1978..... 1

REPLY ARGUMENT

REPLY TO RESPONDENT'S NO. ONE ARGUMENT: The Respondent has argued that Petitioner's property had not decreased in value. Evidence in the record will show that for the tax year of 1976, Petitioner's property was devalued from $13,860 down to $9,810. For the convenience of the court, this evidence is presented again and may be found at the end of Petitioner's Reply Brief.

Respondent's thrust has been a claim for immunity from suit. In support of his claim, various state cases were given. The Petitioner argues that the Respondent is not immune from suit because Respondent's cited state cases have been superseded. In the consolidated case of Haverlack v. Portage Homes, Inc. (1982), 2 Ohio St. 3d 26, the Ohio Supreme Court rendered a decision that abrogated the immunity doctrine in the state of Ohio. For this court's convenience, the opinion of that case is included herein.

Furthermore, Petitioner argues that in the case of Monel v. New York City Department of Social Services, U.S. Sup Crt., 75-1914, 1978, the high court

held that local governments, municipal corporations, and school boards were "persons" subject to liability. Consequently, the Respondent's claim for immunity is not appropriate and therefore is to be denied.

REPLY TO RESPONDENT'S NO. TWO ARGUMENT: The Respondent has argued that the conduct of an administrative judge who causes the assignment of a case to a visiting judge does not prejudice the rights of a party. In support of Respondent's argument, various state rules of superintendance and civil procedure were cited. The Petitioner argues that prejudice cannot be erased by rules of superintendance and civil procedure. Its a fact that the assignment judge was the Petitioner's adversary in other pending litigation. And, its a fact that this same adversary had a direct role in determining what judge would hear this captioned case. An adversary who has a direct hand in being able to steer a case in whatever direction he desires, can affect the outcome of that case. Its no secret that some judges can be highly opinionated on different issues. This behavior has a profound affect on their decision making process. So, regardless of

whatever rules of superintendance and civil procedure are employed, the fact remains that an assignment judge can prejudice a case with his selection of a trial judge. The assignment judge should have removed himself completely from this case because of his involvement in litigation with Petitioner.

The Respondent has argued that Petitioner raises for the first time in this proceeding, that he could not obtain counsel to represent his interests. Petitioner argues that this is not the first time. Petitioner has raised this before in the lower court and the record will show it.

REPLY TO RESPONDENT'S NO. THREE ARGUMENT: The Respondent has argued that Petitioner attempts to involve Sixth Amendment considerations. Nothing could be further from the truth. The record will show that Petitioner has not involved the Sixth Amendment. Petitioner's questions presented for review clearly show that the constitutional provision involved is the Fourteenth Amendment. Cases cited in Petitioner's argument has been restricted solely to the Fourteenth Amendment. If Sixth Amendment considerations are involved, the Petitioner would like to know where this is.

CONCLUSION

The Respondent's arguments should be dismissed because there is no basis for them, and, Petitioner requests that the Writ of Certiorari be granted.

Respectfully Submitted,

Robert J. Kondrat, pro se
29121 Chardon Road
Willoughby Hills, OH 44092
Telephone (216) 944 0140

City of Willoughby Hills, OH
Abraham Cantor
Byron & Cantor
36100 Euclid Avenue/Suite 330
Willoughby, OH 44094
Telephone (216) 951-2303

Attorney for Respondent

Respondent's order prohibiting appellee from publishing information gathered in open court was not issued in conformity with the *Nebraska* test. The judgment of the court of appeals granting the writ of prohibition is accordingly affirmed.

Judgment affirmed.

CELEBREZZE, C.J., W. BROWN, SWEENEY, LOCHER, HOLMES and C. BROWN, JJ., concur.

KRUPANSKY, J., not participating.

HAVERLACK ET AL., APPELLANTS, *v.* PORTAGE HOMES, INC., ET AL., APPELLEES.

RICHNER ET AL., APPELLANTS, *v.* PORTAGE HOMES, INC., ET AL., APPELLEES.

[Cite as Haverlack *v.* Portage Homes, Inc. (1982), 2 Ohio St. 3d 26.]

Municipal corporations—Negligent operation of sewage treatment plant—Defense of sovereign immunity not available, when—Administrative law—Administrative remedies before Environmental Protection Agency need not be exhausted, when—R.C. 3704.09.

O.Jur 2d Pollution Control § 54.

1. Pursuant to R.C. 3704.09, it is not necessary for a private citizen to pursue and exhaust his administrative remedies with the Ohio Environmental Protection Agency before initiating court action for money damages caused by a sewage treatment plant.

O.Jur 3d Counties etc. §§ 650, 651.

2. The defense of sovereign immunity is not available, in the absence of a statute providing immunity, to a municipal corporation in an action for damages alleged to be caused by the negligent operation of a sewage treatment plant.

(Nos. 81-1683 and 81-1784—Decided December 15, 1982.)

APPEALS from the Court of Appeals for Portage County.

In 1972, construction of a sewage treatment plant was commenced by Portage Homes, Inc., Manuel Barenholtz and Walden Co. Ltd., collectively "Walden," appellees herein. Although the plant was built to service the eight hundred-acre residential complex known as Walden, the plant was located outside the development on 4.99 acres of land owned by Portage Homes. The

treatment plant was operated for the benefit of Walden by the city of Aurora, appellee herein, pursuant to a permit issued by the Ohio Environmental Protection Agency ("EPA").

Following the construction of, but prior to the second expansion of the plant, neighboring landowners, Frank and Harriet Haverlack and Robert and Virginia Richner, appellants herein, objected to the plant's location and to the noise and odors emitted from the plant. Separate complaints were filed in the Court of Common Pleas of Portage County on August 30, 1978 by the Haverlacks and on February 22, 1979 by the Richners. The defendants in both suits were Walden and the city of Aurora. The complaints alleged, *inter alia*, injuries caused by odor and noise from the sewage treatment plant located adjacent to their properties (within two hundred and four hundred feet of Haverlacks' and Richners' residences, respectively) and sought damages for both past and future injuries and an injunction of the alleged nuisance. The complaints also alleged that the odor and noise had increased due to the expansion of the plant. The capacity of the facility was enlarged from an initial capacity of eighty thousand gallons to three hundred twenty thousand gallons per day at the time the complaints were filed.

Walden moved for summary judgment on the ground of failure to exhaust administrative remedies provided before the EPA. The city of Aurora also moved for summary judgment based upon the failure to exhaust administrative remedies and sovereign immunity. The trial court sustained both motions in each case. The court of appeals affirmed the granting of summary judgments in favor of the city, but modified the judgments to a dismissal of the complaints against Walden.

The causes are now before this court pursuant to the allowance of motions to certify the record.

Messers. Loomis, Poland, Wilson & Griffith and *Mr. Harry L. Griffith*, for appellants in case No. 81-1683.

Mr. R. Andrew Richner, for appellants in case No. 81-1784.

Mr. John H. Gibbon, director of law, for appellee city of Aurora.

Messrs. Williams, Zumkehr, & Welser, Mr. Benito C. R. Antognoli and *Mr. Charles E. Zumkehr*, for appellees Walden.

CELEBREZZE, C.J. These appeals require that we review the decisions of the court of appeals to ascertain if it was correct in affirming the granting of summary judgments against the appellants. Because the facts and issues presented are similar, the cases have been consolidated.

I

The initial question for our consideration is whether summary judgments were properly granted on the ground of failure to exhaust administrative remedies. The court of appeals, in *Haverlack*, concluded that "[t]he subject matter of appellants' complaint is clearly within the province of the Environmental Protection Agency and the evidence before the court clearly in-

dicated appellants failed to exhaust their administrative remedy before said state agency."[1] For the following reasons, we conclude that it is unnecessary to exhaust administrative remedies and consequently summary judgments were improperly granted.

Appellants maintain that it is unnecessary to pursue their remedies with the EPA before filing a complaint for judicial action. They contend that pursuing the administrative process would be futile because the EPA cannot consider the issue of a nuisance and has no authority to award the money damages they seek.

Conversely, appellees contend that complaints related to pollution should be initially addressed to the EPA and that it is necessary to exhaust this administrative remedy prior to judicial action. They argue that the EPA has the necessary technical expertise to determine the existence of the alleged pollution.

We conclude that it is unnecessary for appellants to pursue administrative remedies prior to initiating judicial action. We find that R.C. 3704.09 disposes of this issue. It provides that:

"Determinations made by the director of environmental protection or other persons acting under sections 3704.03 and 3704.04 of the Revised Code shall not be used as evidence in civil actions nor create any presumption of law or finding of fact which shall inure to or be for the benefit of any person other than the state, and sections 3704.01 to 3704.07 of the Revised Code do not create, enlarge, or abrogate existing private rights. Nothing in Chapter 3704 of the Revised Code shall be construed to abridge, limit, or otherwise impair the right of any person to damages or other relief on account of injury to persons or property and to maintain any action or other appropriate proceedings therefor."

The last sentence in R.C. 3704.09 clearly provides that nothing in this chapter shall impair a person's right to damages or to maintain an action at common law. Thus, common law rights and remedies are preserved, which would include the action in the cause *sub judice* for money damages caused by nuisance.[2]

Another indication that the General Assembly intended that common law rights and remedies be preserved is found in the first sentence of R.C. 3704.09. It provides that injured parties are precluded from using the findings of the EPA in civil actions. Thus, even if a complainant pursued an administrative remedy with the EPA and was successful, he could not use that decision in a civil action. Thus, requiring appellants to pursue an ad-

---

[1] Although R.C. 3704.09 was argued, the court's opinion did not mention it.

[2] Appellees rely upon *State, ex. rel. Brown*, v. *Rockside Reclamation*, (1976), 47 Ohio St. 2d 76 [1 O.O.3d 46]. This case concerned the authority of the Attorney General to file a suit against a landfill for violation of R.C. 3767.13, a general nuisance statute. The case *sub judice* is an action for money damages brought by private individuals and concerns R.C. 3704.09. Because of these factual differences, *Rockside* is inapposite.

ministrative remedy would be costly and futile. Further support for our conclusion is found in R.C. 3704.03. This lengthy section codifies the powers of the director of the EPA, none of which includes awarding money damages.

Based upon the legislative directives in R.C. 3704.09, we hold that pursuant to this section, it is not necessary for a private citizen to seek and exhaust his administrative remedies with the EPA before initiating a civil action for money damages caused by a sewage treatment plant. Thus, summary judgments were improperly granted for failure to exhaust administrative remedies.

II

Summary judgment was also granted to the city of Aurora in each case on the additional ground that the suit was barred by the doctrine of sovereign immunity. Appellants contend that the defense of sovereign immunity should not be available to the city.

The historical development of the doctrine of sovereign or governmental immunity of municipal corporations has been discussed in *Haas* v. *Akron* (1977), 51 Ohio St. 2d 135, 140 [5 O.O.3d 110] (William B. Brown, J., dissenting), and *Hack* v. *Salem* (1963), 174 Ohio St. 383, 391 [24 O.O.2d 34] (Gibson, J., concurring in judgment). Consequently, it is unnecessary for us to repeat this background. However, for a perspective on the current situation, it will be helpful to summarize the operation of the doctrine.

A municipal corporation has been characterized as being both a subdivision of the state and also a corporate entity. Therefore, liability for negligence, and the defense of immunity, have been dependent upon the classification of the municipal function as proprietary or governmental. Traditionally, municipal corporations have been immune from liability in the performance of their governmental functions, unless as otherwise provided by statute. See, *e.g.*, *Broughton* v. *Cleveland* (1957), 167 Ohio St. 29 [4 O.O.2d 1]. However, the defense of immunity has not been available to a municipal corporation in the performance of proprietary functions. See, *e.g.*, *Sears* v. *Cincinnati* (1972), 31 Ohio St. 2d 157 [60 O.O.2d 113].

Attempts to classify municipal functions into these two categories have caused confusion and unpredictability in the law. "[T]he classification of particular functions of municipalities has been difficult and frequently leads to absurd and unjust consequences." *Hack*, *supra*, at 394. Furthermore, "it is impossible to reconcile all the decisions of this court dealing with the subject of governmental and proprietary functions in relation to a municipality." *Eversole* v. *Columbus* (1959), 169 Ohio St. 205, 208 [8 O.O.2d 167]. Thus, this "bramble bush," as described in *Hack*, *supra*, deserves clarification with the formulation of a definite rule of law.

Furthermore, as we consider the viability of the doctrine, we are mindful of its unjust results. Many innocent injured victims have been precluded from recovering damages from municipalities because of sovereign immunity from liability for their negligence in the performance or nonperformance of

governmental functions. Clearly, the municipality is better able to bear the cost of an injury it causes than the individual victim. The municipality should be run with the same care and circumspection as a business, protecting itself in the same manner from liability incurred by its servants. A municipality is able to obtain liability insurance and is able to spread the cost among the taxpayers.

As aptly stated by Justice William B. Brown in *Haas, supra*, "the judicially created doctrine of sovereign immunity is a legal anachronism which denies recovery to injured individuals without regard to the municipality's culpability or the individual's need for compensation." *Id.* at 145. Because Ohio's sovereign immunity for municipalities was judicially created (see *State* v. *Franklin Bank of Columbus* [1840], 10 Ohio 91; *Western College of Homeopathic Medicine* v. *Cleveland* [1861], 12 Ohio St. 375; and *Thacker* v. *Bd. of Trustees of Ohio State Univ.* [1973], 35 Ohio St. 2d 49, 67-68 [64 O.O.2d 28] [William B. Brown, J., dissenting]), it can be judicially abolished. (See *Sears, supra*, at 162.) When we considered sovereign immunity last year, we noted that only six other states adhered to the traditional common law immunity doctrines. *Schenkolewski* v. *Metroparks System* (1981), 67 Ohio St. 2d 31, 38 [21 O.O.3d 19]. *Stare decisis* alone is not a sufficient reason to retain the doctrine which serves no purpose and produces such harsh results. Therefore, we join with the other states in abrogating the doctrine.

We hold that the defense of sovereign immunity is not available, in the absence of a statute providing immunity, to a municipal corporation in an action for damages alleged to be caused by the negligent operation of a sewage treatment plant. A municipal corporation, unless immune by statute, is liable for its negligence in the performance or nonperformance of its acts. To the extent that they are inconsistent with this opinion, *McKee* v. *Akron* (1964), 176 Ohio St. 282 [27 O.O.2d 197], and *Haas* v. *Akron* (1977), 51 Ohio St. 2d 135 [5 O.O.3d 110], are overruled.

Therefore, sovereign immunity is not available as a defense for the city of Aurora. Because summary judgments were improperly granted, appellants will have the opportunity to prove their allegations when the causes are remanded for trials on the merits.

Accordingly, the judgments of the court of appeals are reversed and the causes are remanded.

Judgments reversed and causes remanded.

W. Brown, Sweeney and C. Brown, JJ., concur.

Locher, Holmes and Krupansky, JJ., concur in part and dissent in part.

DUE FOR TAXES ON THE HEREIN DESCRIBED PROPERTY IN LAKE COUNTY, OHIO, FOR TAX YEAR 1977

KONDRAT ROBERT J
4 TRACT
1 LOT
EUCLID-CHARDON RD ALOT
FT 0.00AC 2.38

1977 KONDRAT ROBERT J
29121 CHARDON RD
-019 WICKLIFFE OHIO44092

Bill Brown Title

CURRENT TAX	AG	PRIOR TAX	TOT. CUR. TAX DUE	INTEREST
30138		27124	28904	
B. CREDIT	CUR. SPEC. ASMTS	DELINQUENCIES	ADJ. DELQ.	
		1780		
PENALTY		TOTAL DUE	ADJ. TOTAL DUE	
3014		28904		

MABLE P. JOHNSON, TREASURER

KONDRAT ROBERT J
4 TRACT
1 LOT
EUCLID-CHARDON RD ALOT
FT 0.00AC 2.38

DETACH THIS IS YOUR RECEIPT

31A-008E-00-019 PARCEL
FIRST HALF 4,260 LAND
TAX YEAR 1976 9,600 BLDG
TAXPAYER'S RECEIPT 13,860 TOTAL
HOMESTEAD REDUCED VALUE

WILLOUGHBY HILLS CTY

NET CURRENT TAX	TOT. CUR. AMT. DUE	INTEREST
27124	28904	
CUR. SPEC. ASMTS	DELINQUENCIES	ADJ. DELQ.
1780		
	TOTAL DUE	ADJ. TOTAL DUE
	28904	

MABLE P. JOHNSON, TREASURER

Kondrat, R. J.
1
PAID
MABLE P. JOHNSON
County Treas.

JAN 21 1977

DETACH THIS IS YOUR RECEIPT

31A-8E-19 PARCEL
FIRST HALF 2130 LAND
TAX YEAR 1976 7680 BLDG
TAXPAYER'S RECEIPT 9810 TOTAL
HOMESTEAD RED VALUE

NET CURRENT TAX	TOT. CUR. AMT. DUE	INTEREST
191 99	209 79	
CUR. SPEC. ASMTS	DELINQUENCIES	ADJ. DELQ.
17 80		
		ADJ. TOTAL DUE
	209 79	